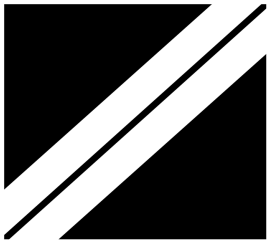

Motor Trades Association of Australia

CCAAC Issues Paper
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: CCAAC@treasury.gov.au

Dear Sir/Madam

Thank you for the opportunity to submit comment on the Issues Paper, *Consumer rights: Statutory implied conditions and warranties,* released by the Minister for Competition and Consumer Affairs, the Hon Dr Craig Emerson MP, on behalf of the Commonwealth Consumer Affairs Advisory Council (CCAAC). The comments presented below are made on behalf of the Motor Trades Association of Australia (MTAA).

MTAA is the peak national representative organisation for the retail, service and repair sector of the Australian automotive industry. The Association represents the interests, at the national level, of over 100,000 retail motor trade businesses with a combined turnover of over $160 billion and which employ over 308,000 people. The Association is a federation of the various state and territory motor trades associations, as well as the NSW based Service Station Association (SSA) and the national Australian Automobile Dealers Association (AADA). MTAA also has a number of Affiliated Trade Associations (ATAs) - including, for example, the Engine Reconditioners Association of Australia (ERAA) - which represent particular sub-sectors of the retail motor trades ranging from motor vehicle body repair to automotive parts recycling.

MTAA's foremost interest in the Issues Paper is the consideration being given to ". . . *the need for 'lemon laws' in Australia to protect consumers who purchase goods that repeatedly fail to meet expected standards of performance and quality*." This is particularly so given, ". . . *the terms of reference for this review focus particularly on motor vehicle lemons*".

In 2007, AADA submitted comment on the proposed introduction of 'lemon laws' by the Victorian Government. A copy of that submission is attached for your interest at **Attachment A**. The views expressed in that submission reflect MTAA's current policy position in relation to 'lemon laws' and the submission explains in some detail the Association's views on that issue. The introduction of 'lemon laws' is therefore opposed by MTAA. MTAA believes the introduction of 'lemon laws' is not only unnecessary but detrimental to motor vehicle dealers and questions what benefit there will be from such laws for consumers. MTAA also notes that there has been no evidence produced, either by the Victorian Government in its initial discussion paper, or now by the Commonwealth Consumer Affairs Advisory Council, to support the need for so-called 'lemon laws' and that is particularly so in relation to motor vehicles.

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In fact from information provided to the Association by one of its Member Associations, it would seem as if any 'confirmation' of a vehicle as a 'lemon' represents circumstances that are something of an aberration. Approximately 1,000,000 new motor vehicles are sold in Australia every year. Of those, approximately one third are sold in New South Wales: a jurisdiction that, through the operation of its Consumer Trader and Tenancy Tribunal (CTTT), is able to make a determination on a vehicle in terms of it being of 'merchantable quality' or as being 'fit for purpose' (under the provisions of the *Fair Trading Act* (NSW) *1987* and the *Sale of Goods Act* (NSW) *1923*).

In the period from 2004/2005 to 2007/2008, some 410 applications were made to the CTTT with respect to seeking a determination as to the 'merchantable quality / fit for purpose' nature of new motor vehicles sold in NSW. That is to say, 410 vehicles out of the approximately 1,000,000 vehicles sold in that State during the same period were subject to some review as to their 'fitness for purpose'. Of that 410, only three vehicles – or 0.0003 per cent of all vehicles sold in that period – were deemed by the CTTT to not be of merchantable quality. Such figures do not, in the Association's view, substantiate the need for 'lemon laws'.

It is noteworthy, too, to consider a contextual element involved in the making of such a determination. This is the concept of 'consumer expectation'. While at first blush the employment of such a concept might seem a logical proposition, it would be the Association's contention that it nevertheless needs to be tempered by the partnering of it with the concept of 'reasonableness'. That concept of 'reasonableness' needs to be taken into consideration when determining if a product is 'fit for purpose' (particularly if the consumer has expectations of that product that are unreasonable and if the intended or actual use is one that might not ordinarily be *anticipated* for that product by its manufacturer).

The Association has also expressed concerns with respect to the manner in which any proposed 'Lemon Law' regime might be administered, and about its proposed nature and / or reach. For example, it is a common characteristic of virtually all contemporary dealership agreements (all dealerships are essentially a franchise arrangement) that the supplier – be they manufacturer or importer – will exercise complete control over warranty policy and processes. These policies and processes are generally immutable, incontestable, are regularly or periodically rigidly audited in accordance with supplier determined guidelines and can – if determined by the supplier to have been breached by the dealer – can be considered as a sufficient trigger for the unilateral termination of that dealer's agreement with the supplier at limited notice.

Thus, suppliers invariably exert complete control over dealers with respect to matters such as:

- whether a reported problem is warrantable or not in the first instance;
- the time allowed to effect a remedy;
- the level of financial reimbursement the dealer may receive, and;
- the actions to be taken to obtain any remedy.

Any action for compensation under any proposed 'Lemon Law' must, therefore, give regard to the supplier / manufacturer as the party of responsibility in the first instance and as an automatic default.

The Association considers it unfortunate that there also seems to be an almost automatic default activated by the term 'Lemon Laws' that it is referring to motor vehicles. MTAA and AADA consider the attribution completely unwarranted and are disappointed that the term is, on occasion, applied disparagingly by stakeholders and officials whose observations and reasoning and analysis skills ought to have them conclude that there are simply insufficient drivers in the Australian automotive market for targeted laws of that sort aside from political expediency.

All of which is not to say that the Association does not consider that some form of protections for consumers might be warranted in some way. The Association believes that in relation to new motor

vehicles, there are at this point, sufficient protections for consumers through the warranties provided by new vehicle suppliers and through the warranty provisions of the Trade Practices Act.

The overwhelming majority of retail motor traders are small businesses that employ less than five people. These are 'mum and dad' businesses that individually have little power in the market in their dealing with their suppliers. In many respects they, too, are 'consumers', irrespective of their being perhaps 'wholesale' as distinct from 'retail' consumers in the market. What is inevitable on occasion of a retail consumer having a complaint with respect to the performance of a product, however, is that it will be the retail trader that becomes the initial point of contact and, most likely, the conduit for the pursuit of any remedy.

There is one specific issue that the Association would like to raise with the Committee and that relates to circumstances where retail motor traders in the course of their business activities purchase goods (generally as in automotive parts) which are then 'used' in the repair/reconditioning of a customer's vehicle. That particular issue is one that has been raised with the MTAA National Secretariat by its engine reconditioner members. .

The issue, as it has been put to the MTAA National Secretariat, is that the decline in the local production of quality engine components has presented opportunities in the market for suppliers with the capability to source components from overseas. It is our understanding that, as a result, parts quality has also been in overall decline. While it may be possible to source original equipment manufacturer (OEM) components in most circumstances that, too, is a space in the market that is highly competitive.

Unfortunately, there is little or no independent testing or evaluation performed on aftermarket components or, in particular, engine components. Often, any 'testing' is conducted 'in service' after an engine has been rebuilt using these components. There is no method by which a component might be visibly determined to be 'fit for service' and it may well be that a set of piston rings (for example) may only reveal themselves to not be of 'merchantable quality' or 'fit for purpose' after they have been installed in an engine and it is discovered that the normal heat cycles of that engine's operation over a short period of time has led to those rings losing a significant amount of their radial tension (with a consequential decrease in engine performance and efficiency and an increase in its oil consumption). Similar circumstances might also apply to engine plain bearing quality or gasket quality (particularly cylinder head gaskets).

It has been anecdotally yet reliably reported to MTAA that engine reconditioners are increasingly finding that the suppliers of such goods/parts, when components have been found to be deficient in performance, are somewhat unwilling to take responsibility for the quality of their goods/parts. The reconditioner will invariably be already significantly out of pocket due to the need to remove and disassemble the effected engine in order to assess the cause associated with their customer's complaint. It is not clear to MTAA that the current provisions of the Trade Practices Act require suppliers of goods (and/or services) in those circumstances to warrant the quality and fitness for purpose of the goods/services being sold. There is, it seems to us, however a clear obligation on the part of our retail motor traders to warrant their services and the products they use in repairing vehicles to their clients. In those circumstances, retail motor traders are increasingly being placed as the party left to provide a remedy for the retail consumer. MTAA believes that the Committee needs to give consideration to changes to the provisions of the Act which currently preclude suppliers of goods/services provided for resale or reuse from having to ensure that those goods/services are 'fit for purpose' (or are of 'merchantable quality'). Often the 'fitness for purpose' of a good cannot be judged simply by the 'look' of the good and faults in production or lack of fit only often become obvious once the part is 'in-situ' or in use.

The final issue that the Association would like to draw to the attention of the Committee is one relating to the requirement of a 'manufacturer' of a good sold in Australia having to have available the necessary after-sales service and parts. MTAA notes that in respect of some 'opportunistic' importers of motor goods after sales service and parts are not always available. This inevitably leads to frustration on the part of consumers when branded dealers are not able to service or provide parts for the relevant goods. MTAA believes that this issue needs more attention by the relevant authorities; perhaps initially in the form of a consumer awareness campaign. That said, opportunistic importers should not be allowed to ignore their obligations under the Act.

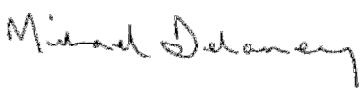
As the Association understands matters, the legislative framework that underpins the concept of warranties in Australia is in need of some review. There are three categories of warranty: implied, manufacturers (or express) and extended. It would be the Association's observation and that of its Members that – despite there being a significant body of regulation and legislation in this area – there is a high level of confusion and a lack of claiming of responsibility (from a number of critical perspectives including government agencies) when products are found to be defective. There is also a distinct surfeit of information in this regard that is readily accessible. The Association would also wish to point out that the various Australian jurisdictions motor dealer legislation and regulation and their attendant statutory warranty frameworks do seem to have been reasonably successful in the market at protecting retail consumers.

What the Association would wish to see as an outcome of the review currently underway is for a nationally consistent framework that has the following characteristics:

- first and foremost that suppliers of goods and services must stand behind their products. In this context, the Association views the retail motor trader as the 'consumer' and places the manufacturer in the position of the supplier;
- that no product or service be excluded. If, for instance, motor vehicles need to meet a certain performance level in terms of 'merchantability' or in meeting declared levels of expectation, then so, too, ought (for example) white goods, footwear or medical services;
- where purchasers rely on a supplier, that no classes of purchasers be excluded. It is not reasonable to adopt a framework that potentially places wholesale consumers at a distinct and arbitrary disadvantage in the market to retail consumers;
- that the courses for remedy for faulty products be simple, certain and accessible for all consumers;
- effective redress must be available to all those parties in the supply chain, and;
- that information material associated with such a framework be unambiguous and that the framework itself makes it abundantly clear as to where responsibilities lie within agencies, businesses and consumers (be they retail or wholesale).

MTAA trusts that these comments are of use to CCAAC in its review of statutory implied conditions and warranties. I look forward to discussing these matters with members of the Committee at our meeting on Monday, 7 September.

Yours sincerely



MICHAEL DELANEY
Executive Director

3 September 2009